Hotliner News

This department notes developments in professional responsibility, including new cases, statutes, rules, regulations, published ethics opinions, and ethics opinions circulated for public comment. Developments in the following areas are regularly covered:

ADVERTISING

Jail Mail

Private criminal defense attorneys have been able to obtain information about prospective clients charged with crimes from police department records and to engage in direct mail marketing of legal services to arrestees. (Cal. State Bar Formal Opn. No. 1995-142 .) Effective July 1, 1996, the Legislature amended Government Code section 6254, subdivision (f) to limit the public's access to the addresses of arrestees. Under the new statute, a person who requests an arrestee's address must declare that the address will not be used to sell a service. In *Los Angeles Police Department v. United Reporting Publishing Corporation* (Dec. 7, 1999; U.S. Supreme Ct.) 1999 Daily Journal D.A.R. 123777, 99 C.D.O.S. 9589, the U.S. Supreme Court held that this statute is not facially invalid, but left open the possibility that it may be invalid as applied.

Of Counsel

In *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, the California Supreme Court recognized that although the "of counsel" designation has different meanings, "the essence of the relationship between a firm and an attorney of counsel to the firm 'is the closeness of the "*counsel*" they share on client matters. (*Id.* at p. 1153.) "The close, personal, continuous, and regular relationship between a law firm and the attorneys affiliated with it as of counsel contains many of the same elements that justify the vicarious disqualification applied to partners, associates, and members." (*Id*. at p. 1154.)

COMMUNICATIONS

Copies of Significant Documents

On June 5, 1997, the California Supreme Court amended rule 3-500 of the California Rules of Professional Responsibility to require that attorneys "promptly [comply] with reasonable [client] requests for . . . copies of significant documents when necessary to keep the client so informed."

COMPETENCE

Mental Impairment of Client

In September 1999, the Bar Association of San Francisco (BASF) issued Opinion Number 1999-2, which discusses the responsibilities of an attorney who believes that mental impairment

prevents a client from making rational decisions. According to this opinion, the attorney may take protective action with respect to the client's person and property, but is not required to do so. BASF suggests that such action may include recommending the appointment of a trustee, conservator, or guardian ad litem and that the attorney has the implied authority to make limited disclosures to achieve the best interests of the client. BASF Opinion Number 1999-2 differs from prior ethics opinions, including California State Bar Formal Opinion Number 1989-112 , Orange County Bar Association Formal Opinion Number 95-002, San Diego County Bar Association Opinion Number 1978-1, and Los Angeles County Bar Association Opinion Number 450. BASF's suggestions are consistent with rule 1.14(b) of the ABA Model Rules and with the wishes of the Estate Planning, Trust and Probate Law Section of the State Bar.

Non-legal Services to Clients

The State Bar has issued a formal opinion addressing the responsibilities of an attorney who provides non-legal services, as well as legal services, to a client. According to the opinion, the attorney generally must comply with the California Rules of Professional Conduct with respect to all services. (Cal. State Bar Formal Opn.No. 1999-154 . Cf. Cal. State Bar Formal Opn. No. 1995-141.)

CONFIDENCES/SECRETS

Duties of Confidentiality and Loyalty to Clients

In *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, the California Supreme Court stated: "Protecting the confidentiality of communications between attorney and client is fundamental to our legal system. . . . To this end, a basic obligation of every attorney is '[t]o maintain inviolate the confidence, and every peril to himself or herself to preserve the secrets, of his or her client.' [Citation.]" The court added: "A related but distinct fundamental value of our legal system is the attorney's obligation of loyalty. Attorneys have a duty to maintain undivided loyalty to their clients to avoid undermining public confidence in the legal profession and the judicial process. [Citation.]" (*Id.* at p. 1145.)

Inadvertent Receipt of Confidential Information From an Adverse Party

In *State Comp. Ins. Fund v. WPS, Inc.* (1999)70 Cal.App.4th 644, the Court of Appeal stated: "When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified. We, do, however, hold that whenever a lawyer ascertains that he or she may have privileged attorney client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of that fact." (*Id*. at pp. 656-657.)

Inapplicability of Crime-Fraud Exception to Bad Faith

Evidence Code section 956 provides: "There is no [attorney-client] privilege . . . if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud." In *Freedom Trust v. Chubb Group of Ins. Companies* (C.D.Cal. 1999) 38 F.Supp.2d 1170, the federal district court determined that a law firm's participation in an insurer's bad faith denial of a claim did not fall within the crime-fraud exception of section 956. According to the federal district court, "the California Supreme Court would hold that a prima facie showing of bad faith does not trigger the crime-fraud exception . . . ." (*Id.* at p. 1174.)

CONFLICTS

New Representation Adverse to a Former Client

The State Bar has issued a formal opinion addressing the responsibilities of an attorney representing a new client in a matter which is adverse to a former client of the attorney's law firm. Based on the facts presented, the opinion asserts that the attorney is not subject to discipline if the attorney fails to obtain the former client's informed written consent. Yet based on the attorney's "broader professional responsibility to a client," the opinion states that the attorney "should" first obtain the former client's informed written consent if the attorney "knows or reasonably should know that another lawyer in the . . . firm obtained material confidential information during the representation of [the] former client." (Cal. State Bar Formal Opn. No. 1998-152.)

Representation of a Corporation and a Constituent

The State Bar has issued a formal opinion addressing the responsibilities of an attorney representing both a corporation and a shareholder of the corporation against another shareholder of the corporation. Based on the facts presented, the opinion states that such representation is ethically permissible "so long as the corporation and [the represented shareholder] do not have opposing interests . . . which the attorney would have a duty to advance simultaneously for each." (Cal. State Bar Formal Opn. No. 1999-153.)

Disqualification Principles

In *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1144-1147, the California Supreme Court extensively discussed disqualification principles. "The paramount concern [for a court confronting a disqualification motion] must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar." (*Id.* at p. 1145.)

Duty to Insured and Insurer

In *State Farm Mutual Automobile Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422, the Court of Appeal held that "an attorney-client relationship is formed between an insurance company and the counsel it hires to defend an insured . . . ." (*Id.* at p. 1428.) An "insurance company is *a client* with respect to its ability to assert the attorney-client privilege under

Evidence Code section 954. [Citation.]" (*Id*. at p. 1429, italics in the original.) An "insurance company has an independent right, as a client, to bring a legal malpractice action against the counsel it hired to defend its insured. [Citation.]" (*Ibid.,* italics in the original.) Thus, for the purpose of a disqualification motion, an insurance company was a client. (*Id.* at p. 1430.)

FEES/COSTS

Fee Agreement for Both an Hourly Rate and a Contingency Fee

In September 1999, the Bar Association of San Francisco issued Opinion Number 1999-1, which suggests that a fee agreement for both an hourly rate and a contingency fee may be permissible.

Obligation to Pay a Discharged Attorney's Lien

In *Levin v. Gulf Ins. Group* (1999) 69 Cal.App.4th 1282, the Court of Appeal held "that an insurer and the attorneys retained to defend the insured are liable for intentional interference with the prospective economic advantage of a discharged attorney when, after receiving a notice of lien for attorney fees and costs filed in the case by the discharged attorney, they pay his former client and the latter's new attorney in settlement or in satisfaction of a judgment with knowledge of the lien." (*Id*. at p. 1288.)

No Obligation to Pay a Client's Insurer in the Absence of an Express Lien

In *Farmers Ins. Exchange v. Smith* (1999) 71 Cal.App.4th 660, the Court of Appeal held that an insurer cannot "press-gang a policyholder's personal injury attorney into service as a collection agent when the policyholder receives medical payments from the insurer and then later recovers from a third party tortfeasor. . . . The simple fact that an insurance policy obligates the *policyholder* to reimburse the insurer for first party medical payments later recovered from a third party does not create an independent obligation on the part of the insured's attorney to 'insure'-for want of a better word-that the client lives up to his or her obligation. The attorney is not the client's keeper." (*Id.* at p. 662, italics in the original.)

Serious Ethical Violation Required for Forfeit of Fees

According to the Court of Appeal in *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, California law "seems to suggest there must be a serious violation of the attorney's responsibilities before an attorney who violates an ethical rule is required to forfeit fees." (*Id*. at p. 1006.)

Right of an Attorney Lienholder to Refuse to Endorse a Settlement Check in Some Circumstances

In *In the Matter of Feldsot*t (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 754, the review department concluded that an attorney who refused to endorse a settlement check did not violate his fiduciary duty to a former client because the attorney had a valid lien and had taken reasonable and appropriate steps to protect his lien.

Elimination of the Requirement to Disclose the Lack of Insurance Coverage in Fee Agreements

Prior sections 6147 and 6148 of the Business and Professions Code are no longer in effect. New sections 6147 and 6148, which set out the requirements for written fee agreements, became effective on January 1, 2000. Unlike the old sections, the new sections do not require an attorney who lacks errors and omissions insurance coverage to disclose this fact in a written fee agreement.

Payment of Fees as a Factor to Consider in Determining an Attorney-Client Relationship

In *Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc.* (1999) 69 Cal.App.4th 1399, the Court of Appeal held that "payment of attorney fees alone does not determine an attorney-client relationship; it is merely a factor. [Citation.]" (*Id.* at p. 1404.)

MISCONDUCT/MORAL TURPITUDE

Honesty in Dealing With the Courts

Citing subdivisions (b), (c), and (d) of Business and Professions Code section 6068 and rule 5-200(B) of the Rules of Professional Conduct, the Court of Appeal stated: " ' " *Honesty* in dealing with the courts is of paramount importance, and *misleading a judge is, regardless of motives, a serious offense*." ' [Citations.] 'Counsel should not forget that they are officers of the court, and while it is their duty to protect and defend the interests of their clients, *the obligation is equally imperative to aid the court in avoiding error and in determining the cause in accordance with justice and the established rules of practice*.' [Citation.]" (*Datig v. Dove Books, Inc.* (1999) 73 Cal.App.4th 964, 980, italics in the original.) According to the court, "once the attorney realizes that he or she has misled the court, even innocently, he or she has an affirmative duty to immediately inform the court and to request that it set aside any orders based upon such misrepresentation; also counsel should not attempt to benefit from such improvidently entered orders." (*Ibid.*)

Applicability of State Ethical Requirements to Federal Attorneys

"An attorney for the [federal] Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." (28 U.S.C. section 530B(a), effective April 19, 1999.)
Consideration of ABA Model Rules and Ethics Opinions

In *State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, the Court of Appeal stated that "the ABA Model Rules of Professional Conduct may be considered" to determine an attorney's duties, "particularly in areas where there is no direct authority in California and there is no conflict with the public policy of California. [Citation.]" Yet the "finding that an attorney has engaged in conduct contrary to an ABA formal opinion does not establish an obligatory

standard of conduct imposed on California lawyers. Consequently it may not be equated to a failure to act in good faith such that sanctions are warranted." (*Id.* at p. 656, italics in the original.)

RECENT OPINIONS BY THE REVIEW DEPARTMENT OF THE STATE BAR COURT

From June 1999 through April 2000, the Review Department of the State Bar Court filed the following opinions designated for publication and citeable as precedent:

In the Matter of Jebbia (Rev. Dept. 1999) 4 Cal. State Bar Ct. Rptr. 51. The review department addressed the application of Business and Professions Code section 6102, subdivision (c), the statutory amendment which authorizes summary disbarment upon conviction of a felony involving deceit, fraud, theft, subornation of a false statement, or moral turpitude. The review department held that the amendment may not be applied to Jebbia, who was charged with federal felonies before the amendment's effective date, January 1, 1997, but who was not convicted until after the effective date.

In the Matter of Phillips (Rev. Dept. 1999) 4 Cal. State Bar Ct. Rptr. 47. The review department addressed the application of Business and Professions Code section 6007, subdivision (c)(4), the statutory amendment which requires the automatic involuntary inactive enrollment of an attorney upon a disbarment recommendation by a trial judge. The review department held that the amendment may not be applied to Phillips, whose disciplinary proceeding started before the amendment's effective date, January 1, 1997.

In the Matter of Wyshak (Rev. Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70. The review department adopted a trial judge's disbarment recommendation. Although Wyshak practiced law for over 40 years before engaging in misconduct and had no prior disciplinary record, disbarment was appropriate because of "the grave seriousness of his misconduct coupled with his lack of any meaningful regret, understanding, insight, or acceptance of any responsibility for the consequences of his misconduct."

In the Matter of Jaurequi (Rev. Dept. 1999) 4 Cal. State Bar Ct. Rptr. 56. The review department addressed the application of Business and Professions Code section 6140.5, subdivision (c), which requires an attorney who resigned with disciplinary charges pending to reimburse the Client Security Fund (CSF) for all sums paid out by the CSF as a result of the resigned attorney's misconduct plus applicable interest and costs. The total amount "shall be paid as a condition of reinstatement of membership." The Office of the Chief Trial Counsel (OCTC) argued that a resigned attorney must make this payment not merely as a condition of reinstatement, but as a condition precedent to the filing of a petition for reinstatement. Concluding that the quoted provision was not ambiguous, doubtful, or uncertain, the review department rejected OCTC's argument and declined to reach other claims raised by the parties.

In the Matter of Duxbury (Rev. Dept. 1999) 4 Cal. State Bar Ct. Rptr. 67. The review department addressed the appropriate discipline for a respondent convicted of a misdemeanor violation of Insurance Code section 750, subdivision (a). Determining that the facts surrounding the respondent's violation involved moral turpitude and that respondent had shown significant

mitigation, the hearing judge recommended a two-year stayed suspension and a two-year probation conditioned on actual suspension for one hundred twenty days. OCTC argued that the period of actual suspension should be one year. The review department agreed with the hearing judge's moral turpitude determination, found less mitigation than the hearing judge, and recommended a two-year stayed suspension and a two-year probation conditioned on actual suspension for six months.

In the Matter of Respondent Z (Rev. Dept. 1999) 4 Cal. State Bar Ct. Rptr. 85. The review department held that the State Bar Court need not require that every attorney disciplined with a public or private reproval attend the State Bar Ethics School. To reach this holding, the review department examined section 6078 of the Business and Professions Code, rule 956 of the California Rules of Court, and rules 271and 290 of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings.

In the Matter of Stansbury (filed 2/24/2000). The hearing judge recommended that a defaulting respondent be suspended until he complies with specific requirements and makes a motion to end his suspension under rule 205 of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings. The review department held that a disciplinary recommendation extending actual suspension until compliance with rule 205 must state a definite period of actual suspension and, if appropriate, stayed suspension.

In the Matter of Torres (filed 3/7/2000). The hearing judge found an attorney culpable of three acts involving moral turpitude and two other ethical violations, recommended disbarment, and ordered involuntary inactive enrollment under Business and Professions Code section 6007, subdivision (c)(4). The review department found him culpable of two acts involving moral turpitude, recommended a five-year stayed suspension and a five-year probation conditioned on at least three years of actual suspension, ordered the termination of the involuntary inactive enrollment, and recommended credit for the period of involuntary inactive enrollment towards the three years of actual suspension.

In the Matter of Lais (filed 4/17/2000). The hearing judge found an attorney culpable of some, but not all, charged misconduct and recommended a three-year suspension stayed on probation conditions including one year of actual suspension. The review department found the attorney culpable of all charged misconduct and recommended a three-year stayed suspension stayed on probation conditions including at least two years of actual suspension.

In the Matter of Lantz (filed 4/24/2000). The hearing judge found an attorney culpable of ethical violations over several years in four matters. These violations included misappropriating funds, withholding an illegal fee, recklessly providing incompetent legal services, and failing to return unearned fees promptly and to render an appropriate accounting. The attorney presented positive character evidence and apparently served many clients satisfactorily. The judge recommended a two-year stayed suspension and two-year probation conditioned on many requirements, including one year of actual suspension and restitution. The review department, affirmed the judge's culpability findings and adopted the judge's disciplinary recommendation after modifying two probation requirements.

UNAUTHORIZED PRACTICE OF LAW

Out-of-State Attorney Arbitration Counsel

An out-of-state attorney who is not a member of the California State Bar may represent a client in a California arbitration, subject to specific requirements. (Code Civ. Proc., sec. 1282.4; Cal. Rules of Court, rule 983.4.)

W ITHDRAWAL FROM EMPLOYMENT/TERMINATION

Appointment of a Practice Administrator for a Disabled or Deceased Attorney

Attorneys can plan to dispose of their practices if they become disabled or die by providing for the appointment of a practice administrator. (Prob. Code, secs. 2468 [disabled attorneys], 9764 [deceased attorneys].)

VARIOUS RULES AND OPINIONS CIRCULATING FOR PUBLIC COMMENT

Client File Retention

The State Bar has circulated for comment a draft opinion about client file retention and destruction. According to the draft opinion, an attorney may destroy a non-criminal file after reasonable attempts to locate the former client "so long as the destruction, including the manner of destruction and its timing, will not cause reasonably foreseeable prejudice to the former client." The attorney must "ascertain what is contained in the file before it is destroyed. No specific time period for retention of a particular item can be" established. Criminal files "should not be destroyed without the former client's consent while the former client is living." (Cal. State Bar Formal Opn. Interim No. 97-0003.)

Internet Advertising

The State Bar has circulated for comment a draft opinion about Internet advertising. The draft opinion warns that other jurisdictions may consider such advertising to constitute the unauthorized practice of law. (Cal. State Bar Formal Opn. Interim No. 96-0014.)